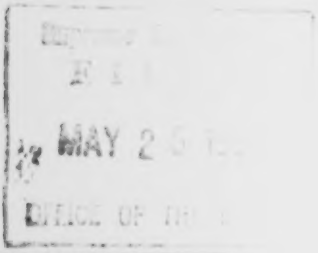
No. 93-21



In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MS. B,

Petitioner,

vs.

MONTGOMERY COUNTY EMERGENCY SERVICES, et. al.,

Respondent.

Petition for Writ of Certiorari to the United states Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Sterling E. Flowers, Esquire
1109 Walnut Street
Philadelphia, Pa. 19107
(215) 625-2906
Attorney for Petitioner
Pending Bar Admission Application

QUESTIONS PRESENTED FOR REVIEW

I. Did the District Court erre in granting summary judgement where a genuine issue of material fact existed concerning Petitioner's mental condition, when Petitioner's mental health was a determinative factor in the outcome of her section 7303 hearing, and where the judgement sets a legal precedent by forcing Pennsylvania Mental Health Workers to follow a "Duty to Warn"?

II. Did Respondent violate Petitioner's right to substantive due process under the Fourteenth Amendment of the United States Constitution by virtue of Respondent's unconsented disclosure of confidential and priviledged information in violation of section 7111 of the Mental Health Procedure Act and the Pennsylvania Constitution?

LIST OF PARTIES

A. The following are person involved in the outcome of this case:

The parties to the proceeding below who are not listed on the cover are Robert Bond and Dr. Ashalatha Reddy, both employees of the Respondent.

B. The opposing law firm and counsel in this case:

Counsel for the Respondents is Jonathan B. Sprague, Esquire, and he is one of the Attornies employed by Post & Schell, P.C., 1800 JFK Boulevard Philadelphia, Pa. 19103

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....v

OPINONS BELOW.....1

STATEMENT OF JURISDICTION.....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....10

A. Procedural Errors

1. The disposition of summary judgement was 13 improper, because there are genuine issues of material fact that should be examined in a trial.....10

2. The District Court erred in granting a motion for summary judgement, because the precedential nature of the present case deserves a comprehensive knowledge and understanding of the facts that can only be accomplished in a trial.....14

B. Legal Errors

1. The District Court erred in not holding that Respondent's disclosure of Ms. B's priviledged and confidential statements made while undergoing psychiatric treatment at Respondent's facilty violated Section 7111 of the Pennsylvania Mental Health Procedures Act.....16

2. The District Court erred in relying on Tarasoff v. Regents of the University of California in light of the factual distinctions between Tarasoff and the present case.....24

3. The District Court erred in not finding that Respondent's violation of Section 7111 of the Pennsylvania Mental Health Procedures Act did not rise to the level of a federal constitutional violation.....30

4. The Court of Appeals erred in dismissing Ms. B.'S reliance on Midnight Sessions, Ltd. v. City of Philadelphia, 945 F. 2d 667 (3d Cir. 1991), cert. denied, 112 S. Ct. (1992) by implying that bad faith on the part of the state actor is required to violate substantive due process.....35

CONCLUSION.....39

TABLE OF AUTHORITIES

Cases: Page:

United States v. Westinghouse Electric Corp., 638 F. 2d. 570 (3rd Cir. 1990).....6

Tarasoff v. Regents of the University of California, 17 Cal. 3d 475, 131 Cal. Rptr. 14 (1976).....7

Sheetz v. The Morning Call, Inc., 946 F. 2d 202 (3rd Cir. 1991).....9

In re J.S., 526 Pa. 418, 586 A. 2d 909 (1991).....21

In re Hutchinson, 500 Pa. 152, 454 A. 2d 1008 (1982).....22

Dunkle v. Food Services East, Inc., 582 A. 2d 1342 (Pa. Super. 1990).....27

O'Donnell v. United States, 891 F. 2d 1079 (3rd Cir. 1989).....33

In re June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 415 A. 2d 73, 77 (1980).....34

Midnight Sessions, Ltd. v. City of Philadelphia, 945 F. 2d 667 (3d Cir. 1991), cert. denied, 112 S. Ct. 1668, 118 L. Ed. 2d 389 (1992).....35

Creative Environments, Inc. v. Estabrook, 680 F. 2d 822 (1st Cir.) cert. denied, 459 U.S. 989 (1982).....37

STATUTES

28 U.S.C. Section 1254(1).....1

42 U.S.C. Section 1983.....1

Mental Health Procedures Act,
50 P. S. section 7101 et seq.....1

MISCELLANEOUS

Fed. R. Civ. P. 56(c).....11

Mental Health Manuel 55 Pa. Code
Section 5100.32(9).....18

INDEX TO APPENDICES

Appendix A	Opinion of the Court of Appeals unreported Ms. B vs. Montgomery County Emergency Services, et al., filed February 24, 1993, 92-1682, 3rd Cir.
Appendix B	Opinion of District Court for the Eastern District of Pennsylvania

OPINIONS BELOW

The memorandum opinion of the Court of Appeals is unpublished, and appears in Appendix A to this petition. The unpublished written opinion of the District Court for the Eastern District of Pennsylvania appears in Appendix B to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals' Opinion in this matter was filed on February 24, 1993. No Petition for Rehearing was filed. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution, 42 U.S.C. Section 1983, 55

P.S. Section 7111 (Pennsylvania Mental Health Procedures Act), Federal Rule of Civil Procedure 56(c), 55 Pa. Code 5100.32(9) (Mental Health Manual), are set forth in Appendix C.

STATEMENT OF CASE

The United States District Court, Eastern District of Pennsylvania Division, had jurisdiction pursuant to Title 42, U.S.C. Section 1983.

This action originated from a conversation that Petitioner, Ms. B, had with her attorney, Sterling Flowers, in December, 1986. During that conversation she told Mr. Flowers that she was angry with some of her coworkers and her supervisors, and she expressed a desire to physically harm them. Ms. B was a 13 year employee of

the United States Postal Service. Mr. Flowers arranged for Ms. B. to speak with personnel of the Petitioner, Montgomery County Emergency Services, to discuss her problems.

On January 6, 1987, Ms. B sought psychiatric counseling from Respondent, Montgomery County Emergency Services, an emergency psychiatric facility. As a result of her initial interview wth Respondent's personnel, Ms. B was involuntarilly committed to Respondent's facilty for five days in accordance with the Pennsylvania State Mental Health Procedures Act. Since Ms. B's was involuntarilly held and hearing was held within five days to determine if she should be released and/or committted for an additional term of thirty days. After all of the evidence was presented to an

independent hearing officer, Ms. B was found not to be a clear and present danger to herself or to anyone else. In accordance with the Mental Health Procedures Act, Ms. B was released from Respondent's facility.

Respondent's personnel, unhappy with the outcome of the hearing, made a unilateral decision to notify Ms. B's employer, federal and local law enforcement agencies of her discharge from Respondent's facility. In notifying these parties, Respondent divulged confidential and priviledged statements spoken by Ms. B during her psychiatric treatment. As a result of Respondent's disclosures, Ms. B was terminated from her job with the Postal Service, arrested, subject of undue police scrutiny and became financially destitute.

On January 6, 1989, Ms. B initiated an

action in the United States District Court, Eastern District of Pennsylvania. The surviving claim of the Complaint filed under 42 U.S.C. 1983 alleges that Respondent's act of disclosing Ms. B's priviledged and confidential statements, made while undergoing psychiatric treatment, to her employer and to local law enforcement agencies, violated her right to substantive due process under the fourteenth amendment of the United States Constitution. Ms. B further alleges that Respondent's disclosure violated Section 7111 of the Pennsylvania Mental Health Procedures Act which prohibits (with four specific exceptions) unconsented disclosures such as represented in the present case.

On March 23, 1992, Respondent filed a motion for summary judgement and on July 17,

1992 the District Court granted the motion in favor of Respondent. The District Court's opinion, written by Judge Louis H. Pollak, acknowledges that Ms. B does have a constitutionally protected privacy interest in her statements made during her commitment at Respondent's facilty. Judge Pollak did not commit himself to a decision on the issue of whether Respondent's action violated the Mental Health Procedures Act. However, he wrote that even if the Respondent's disclosures violated the statute, the violation "would not necessarily establish a violation of plaintiff's federal constitutional rights." In reaching his holding, Judge Pollak relied on United States v. Westinghouse Elec., Corp., 638 F. 2d 570 (3d Cir. 1980). Westinghouse advances a test to determine whether the confidentiality of medical

records deserve constitutional protection in a given circumstance. The Westinghouse test requires a balancing of the interests of the individual in nondisclosure against the states interests that are furthered by disclosure. Westinghouse, 638 F. 2d at 578. The Westinghouse court lists several factors to be considered in the analysis. Id. The critical aspect of Judge Pollak's analysis regards his use of Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976). In Tarasoff, the California Supreme Court held that mental health professionals have a duty to take reasonable steps to warn persons who are potential victims of the patient. The Tarasoff "duty to warn" was not accepted as law in Pennsylvania at the time Judge Pollak wrote his opinion. Therefore, his reliance on Tarasoff in the present case sets a new

legal precedent in Pennsylvania common law. Prior to his opinion in this case there was no "duty to warn".

On August 17, 1992, Ms. B filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. On February 24, 1993, the Court of Appeals affirmed the District Court's summary judgement, for the Respondent, in a memorandum opinion.

The Court of Appeals' cursory review of the present case also acknowledges that Ms. B has a constitutionally protected privacy interest in her psychiatric records, but thought there were some questions as to constitutional protection of the statements divuldged in the present case. The Court of Appeals concurred with the District Court's analysis under Westinghouse and held that

Ms. B's privacy right was not infringed.

The Court of Appeals did not rule on whether Respondent's disclosure violated the Section 7111 of the Mental Health Procedures Act, but in accordance with Scheetz v. Morning Call, Inc., 946 F. 2d 202, 207 (3rd Cir. 1991), cert. denied, 112 S. Ct. 1171 (1992), the court pronounced that "the violation of a state statute alone is insufficient to establish a violation of a constitutional right."

Finally, the Court of Appeals held that in the present case Judge Pollak's disposition by summary judgement was appropriate. The Court of Appeals believes that the primary issue in the present case is legal in nature and is couched in terms of "whether the disclosure, made in good faith, violated Ms. B's right to substantive

due process". The Court of Appeals further states that the obvious factual question of Ms. B's actual state of mental health as evidenced by the conflicting views of Respondent and the Mental Health Review Officer is not material to the fair adjuication of the present case.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons:

The District Court's disposition and the Court of Appeal's affirmance of the present case through summary judgement for Respondent was procedurally improper and improper as a matter of law.

Procedural Errors

1. <u>The disposition of summary judgement was</u>

improper, because there are genuine issues of material fact that should be examined in a trial.

The Federal Rules of Civil Procedure proscribe that a district court should not grant a motion for summary judgement unless the record shows "that there is no genuine issue as to any material fact...". Fed R. Civ. P. 56(c).

In any legal conflict, there is a factual scenario that leads to and results in a conflict of opinion of the rights and\or duties of the parties involved. When a legal conflict is brought to courts for fair adjudication, the statutes and common law cannot be properly applied to resolve the dispute unless a clear and detailed finding of the facts is conducted. The present case presents a factual dispute

which is critical to the correct application of the law.

The pivotal factual issue in the present case concerns Ms. B's actual state of mental health at the time of her Section 7303 hearing. Respondent had ample opportunity to produce evidence that Ms. B's involuntary commitment to their psychiatric facility should be extended. After a fair and impartial hearing, the Mental Health Review Officer found Ms. B was not a clear and present danger to herself or to anyone else and presumably in a good enough state of mental health to preclude further involuntary commitment. However, Respondent believed that Ms. B's state of mental health did render her a clear and present danger to her coworkers. Consequently, Respondent acted unilaterally

and without any judicial guidance, and divulged Ms. B's priviledged and confidential statements made during her psychiatric treatment at Respondent's facilty.

This scenario presents a conflict in the opinions of the judicial officer and Respondent that was could not be properly resolved by a district court judge without cross examination, a trial of the parties and witnesses invovled in the case.

The Court of Appeals dismissed this factual issue by claiming that the issue for summary judgement was purely a legal issue of "whether the disclosure, made in good faith, violated Ms. B's constitutional right to substantive due process". A court cannot assume that Respondent exercised good faith or good judgement without cross examination

of both sides of the factual issue in dispute. Therefore, the District Court's grant and the Court of Appeals affirmation of summary judgement was improper.

2. The District Court erred in granting a motion for summary judgement, because the precedential nature of the present case deserves a comprehensive knowledge and understanding of the facts that can only be accomplished in a trial.

The District Court's legal analysis eventually rested on the Westinghouse test to determine the federal constitutional privacy rights Ms. B possessed in her confidential and priviledged statements. In the process, the court adopted the Tarasoff rule and its "duty to warn" principle. The Tarasoff rule has been reviewed by Pennsylvania courts, but has never been

accepted as a Pennsylvania common law principle. Although, the Court of Appeals fails to even mention Tarasoff in its opinion, the present case sets a legal precedent in Pennsylvania common law.

There is a question of whether Tarasoff should be introduced into Pennsylvania as law on the basis of the facts of the present case as they are known. There is also a question of the Tarasoff rule's application in light of the scant fact finding the District Court used to arrive at summary judgement. The introduction of new law to a state's judicial process is not a trivial matter. A case with precedential value is deserving of the most penetrating scrutiny of the facts. The best fact finding tool at the court's disposal is the trial. In light of the factual dispute in the present case

as evidenced by the conflicting opinions of Respondent, Mental Review Officer, and the legal precedent involved, the present case should be decided after a trial and the summary judgement should be reversed.

If the law in Pennsylvania is going to be revered and the mental health workers of the state, burden with a "duty to warn", then setting a precedent standard through summary judgement is inappropriate.

Legal Errors

1. The District Court erred in not holding that Respondent's disclosure of Ms. B's priviledged and confidential statements made while undergoing psychiatric treatment at Respondent's facilty violated Section 7111 of the Pennsylvania Mental Health Procedures Act.

The District Court and the Court of Appeals refused to conclude that Respondent did or did not violate the Mental Health Procedues Act. However, the District Court's opinion, misread and misinterpreted the statute. Section 7111 of the Act stipulates in relevant part:

> All documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may not be released or their contents diclosed to anyone except:
>
> 1) those engaged in providing treatment for the person;
>
> 2) the county adminstrator, pursuant to section 110; and
>
> 3) a court in the course of legal proceedings authorized by this act; and
>
> 4) pursuant to Federal rules, statutes and regulations governing disclosure of patient

> information where treatment is undertaken in a Federal agency.
>
> In no event, however, shall priviledged communication, whether written or oral, be disclosed to anyone without such written consent.

The four exceptions to Section 7111 do not provide Respondents with a valid exception with which they can legally base their disclosure.

The District Court believed that Respondent's disclosure might be justified by invoking Section 5100.32(9) of the Mental Health Manual. Section 5100.32 entitled, Nonconsentual release of information is a regulation of the Mental Health Manual issued by the Pennsylvania State Department of Public Welfare. 55 Pa. Code 5100.32. The regulation forbids the unconsented release,

to third parties, of records of persons who have received treatment for mental illness. Section 5100.32 lists several exceptions to the rule. Repondent rely on subsection 9 which states:

> In responce to an emergency medical situation when release of information is necessary to prevent serious risk of bodily harm or death. Only specific information pertinent to the relief of the emergency may be released on a nonconsentual basis.

Section 5100.32(9) holds no authority in this case.

First, the District Court and the Court of Appeals are incorrect in stating that the Mental Health Manual is an implimenting regulation or promulagating regulation of the Mental Health Procedues Act. There is no documentation to suggest the relationship between the statute and regulation.

Second, there is no legislative history or applicable case law to support the courts' interpretation of the regulation in the present case. They merely stretch the regulation's meaning beyond any reasonable interpretation to suit their purpose. The plain meaning of the regulation allows nonconsensual release only in an "emergency medical situation." There is no way Ms. B's discharge could be considered an "emergency medical situation", after she had been found not to be a clear and present danger to herself or anyone else. An "emergency medical situation" refers to a scenario where a person's health is threatened by an immediate physical injury or illness, or where a person is already injured or ill and the condition becomes worse.

Section 5100.32(9) was not intended as

a vehicle to disclose confidential and priviledged statements of a person who has been declared fit for discharge after a judicial proceeding.

The District Court then refers to Pennsylvania's state interest in protecting its citizens from violent mentally ill people. The court refers to In re J.S, 526 Pa. 418, 586 A.2d 909, (1991) and its use of the M.H.P.A. Statement of Policy 50 P.S. section 7102 (Statement of Policy). A clear example of public policy the court refers to can be found in the following passage:

> "The clear and central intent of the General Assembly in enacting the Mental Health Procedure Act was to assure that those individuals who are severely mentally disabled will be provided with the medical care they need, for their own health and safety, and for the safety of others. This Court has recognized that the state has a solemn duty to safeguard the welfare of the individual and, additionally, the state is oblidged to protect the welfare of

others from the mentally ill person".

In re J.S., 526 Pa. at 418, 586 A.2d at 913. (1991) (citing In re Hutchinson, 500 Pa. 152, 157, 454 A.2d 1008, 1011 (1982).

The District Court reasons that the aforementioned policy statement validates Respondent's disclosure of priviledged and confidential statements. However, the Pennsylvania courts used the quote to support the M.H.P.A.'s provisions for involuntary confinement under section 7302.

In In re J.S., the plaintiff sought remedy for subjection of section 7302 involuntary confinement. The court quoted Hutchinson (another case concerning state involuntary confinement policy).

Essentially, the quote supports the

very procedures which Ms. B had to endure before she was allowed discharge from Appellees' facility. She was involuntarily committed under section 7302 and she was discharged after a section 7303 hearing. Ms. B's entire treatment from commission to discharge reflected the aforementioned quote of the General Assembly's policy to protect "the welfare of others from the mentally ill person".

The quote was not intended to justify the curtailment of constitutional rights to privacy after due process has been served. The General Assembly, in enacting the Mental Health Procedues Act, as its goal:

> "to make voluntary and involuntary treatment available where the need is great and its absense could result in serious harm to the mentally ill person or to others. 50 P.S. section 7102 (Statement of Policy).

This quote refers directly to the intent that the procedures in sections 7302 and 7303 are meant to affect. The meaning of the policy statement is to protect others from the mentally ill by using M.H.P.A. procedures to either voluntarily or involuntarily commit the treated person until he or she is no longer a danger to others. Ms. B was subjected to these procedures and was discharged, after a finding that she was not a "clear and present danger" to herself or to anyone else, in accordance with the General Assembly's stated goal. Again, the General Assembly did not intend its words to justify the curtailment of substantive due process.

2. <u>The District Court erred in relying on Tarasoff v. Regents of the University of California in light of the factual distinc-</u>

tions between Tarasoff and the present case.

The District Court relied heavily on the holding in Tarasoff v. Regents of the University of California, 17 Cal. 3d 475, 131 Cal Rptr. 14, (1976), in its analysis of substantive due process under the Westinghouse rule.

In Tarasoff, a psychiatric patient, while receiving voluntary outpatient treatment told a psychiatrist that he intended to kill a specific person when she returned from a summer vacation. The psychiatrist and two of his collegues wanted the patient involuntarily committed for observation. They elicited the help of campus police to apprehend the patient. The campus police brought the patient into custody. The patient appeared rational to the police officers and he promised to stay

away from the girl. The psychiatrist did not warn the girl or her family of the patient's threats. When the girl returned from her trip, the patient went to her residence and killed her. Tarasoff, 17 Cal. 3d at 433-434, 131 Cal. Rptr. at 21.

Plaintiffs initiated an action to hold the psychiatrists liable for failure to warn the victim of the impending danger. The California Supreme Court held that when a patient presents a serious danger of violence to another, "the psychiatrist is obligated to take steps to apprise the victim. These steps may include notifying the police, or warning the intended victim or others likely to apprise the victim of the danger." Tarasoff, 17 Cal. 3d at 431, 131 Cal. Rptr. at 20.

The Tarasoff "duty to warn" has not

been accepted as law in Pennsylvania. A Pennsylvania Superior Court considered applying Tarasoff to the case of Dunkle v. Food Services East Inc., 582 A. 2d 1342 (Pa. Super. 1990). The court rejected Tarasoff, because of the factual dissimilarities between the two cases. In Tarasoff a "duty to warn" existed, because the potential victim was readily indentifiable. In Dunkle, where a psychiatiric patient killed his live - in girlfriend, the patient did not reveal a specific intention to harm the victim. Dunkle at 1344.

The court had two concerns. First, applying Tarasoff to cases where the victim was not "readily identifiable" imposes a strict liability on psychiatrists that would be unreasonable. Second, the court was

strongly concerned about undermining the sanctity of the psychologist-patient priviledge. Id at 1347.

The facts in Tarasoff and in the present case are equally distinct. The distinction should discourage the use of the present case to adopt Tarasoff into Pennsylvania's common law.

In Tarasoff the patient came to the psychiatrist on an out patient basis. The psychiatrist could have ordered the patient to undergo an involuntary 72 hour commitment once he percieved that the patient was a threat to the victim. Tarasoff, 17 Cal. 3d at 433, 131 Cal. Rptr. at 21. The psychiatrist did not act to have the patient committed, but called campus police to apprehend the patient. Instead of involuntarily committing the patient for

observation by mental health professionals, the psychiatrist and his colleagues allowed the campus police to determine the validity of the patient's threat. The campus police were not properly informed to make that determination. Consequently, a woman was killed.

In the present case, Ms. B voluntarily went to the Respondent's facility to seek help for her problems. Personnel at the facility percieved Ms. B as a threat to her co-workers and had her involuntarily committed for 120 hours. When the time for her committment expired, she was subjected to a section 7303 hearing, where the Appellees attempted to extend her committment. In this case, as opposed to the facts in Tarasoff, a Mental Health Review officer, who was qualified to

determine that Ms. B was not a clear and present danger to herself or anyone else, decided that she was entitled to discharge from the Respondent's facility.

If Tarasoff is adopted into Pennsylvania law on the basis of the facts in the present case, the law will "fly in the face" of an existing state law (section 7303) that provides due process in a fair and reasonable manner. Consequently, Ms. B's constitutional right to privacy will be needlessly violated and the psychaiatirst - patient priviledge will be needlessly undermined.

3. The District Court erred in not finding that Respondent's violation of Section 7111 of the Pennsylvania Mental Health Procedures Act did not rise to the level of a federal constitutional violation.

The District Court and the Court of Appeals erred in attempting to distill and simplify Ms. B's position by stating that, soley because Respondent violated a state statute, Respondent violated Ms. B's rights. This statement of Ms. B's case is incomplete.

First, both courts agree that Ms. B has a constitutional right to the privacy of her treatment records at the Respondent's facility. Both courts agree that a violation of that right might rise to the level of a substantive due process violation. A violation of a substantive due process right is actionable under Section 1983 of the United States Code. Section 1983 provides a civil cause of action for anyone who suffers "deprivation of any rights, priviledges or immunities secured by

the constitution and laws,..." 42 U.S.C. Section 1983. Ms. B concedes that not every state action violating a state law automatically deprives an individual of substantive due process. However, the Respondent's violation of the Mental Health Procedures Act, at the very least, creates a strong presumption that Ms. B's constitutional rights were violated.

The Respondent's misinterpreted Section 5100.32(a) (9) of the Mental Health Manual and sought no judicial guidance. They disregarded Mental Health Procedures Act provisions. They ignored the findings of a judicial proceeding where Ms. B was pronounced fit for discharge from their facility, after they failed to produce evidence that Ms. B was a danger to others. They unilaterally acted to disclose Ms. B's

priviledged and confidential statements to her employer and to outside law enforcement agencies. All of these actions were taken without judicial authorization.

The actions taken by the Respondent's can only be seen as a fundamental procedural irregularity rising to the level of a substantive due process violation. Furthermore, the District Court has ruled, in Ms. B's case, that "Section 1983 affords protection in Pennsylvania against disclosure of psychiatric records when that disclosure is unwarranted,...". Ms. B., United States District Court Opinion of Honrable Louis H. Pollak, J., (1990). Judge Pollak relied on the Third Circuit decision in O'Donnell v. United States, 891 F. 2d 1079 (3rd Cir. 1989) which discussed the constitutional consequences of disclosures

of psychiatric records in relation to the Mental Health Procedures Act. In O'Donnell, Judge Rosen notes, "The Pennsylvania Supreme Court has gone so far as to declare that there is a constitutional right to confidentiality of psychiatric records." Ms. B at 9. (quoting O'Donnell 891 F. 2d at 1086). Although, the Pennsylvania Supreme Court's pronouncement referred to constitutionality under the state constitution, In re June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 415 A. 2d 73, 77 (1980), Judge Pollak reasoned that:

> "Given a recognition by the Court of Appeals that the Pennsylvania Supreme Court has assigned that level of dignity to the principle of non-disclosure of psychiatric records, it appears to me that we are clearly talking about an interest which is a liberty interest protected by the due process clause of the 14th Amendment." Ms. B, at 9.

If the Appellees' violation of the Mental Health Procedures Act does not rise to a violation of substantive due process in this case, then what is the point of state legislation of this type? The Respondents are asking the court to weaken the Act's effect, so that anytime mental health professionals are unhappy with the disposition of a Section 7303 hearing, they can resort to the threat of disclosing the patient's treatment records as leverage to keep the patient institutionalized. This case is a classic example of the "slippery slope" effect that occurs when legislation of value is weakened by judicial exception.

4. The Court of Appeals erred in dismissing Ms. B.'S reliance on Midnight Sessions, Ltd. v. City of Philadelphia, 945 F. 2d 667 (3d Cir. 1991), cert. denied, 112 S. Ct. (1992)

y implying that bad faith on the part of the state actor is required to violate substantive due process.

The case of Midnight Sessions, Ltd. was originally introduced, for examination, to the present case by Respondent in its Court of Appeal's brief at page 17. Apparently, Respondent sought out the latest pronouncement of law regarding substantive due process violations.

In Midnight Sessions the Third Circuit stated that substantive due process is violated when "the government deliberately and arbitrarily" abuses its power. Midnight Sessions, 945 F. 2d at 683., (Appellees' Brief at 17.) Respondent's refered to the Midnight Sessions Court, quoting directly that:

"allegations that the government's

> actions in a particular case were motivated by bias, bad faith or improper motive, such as partisan political reasons unrelated to the merits of the plaintiff's application, may support a finding of substantive due process violation." Midnight Sessions 945 F. 2d at 683. (Appellees' Brief at 17, 18.)

However, Respondent neglected to complete the Midnight Sessions Court's discusion of the issue. Also included in the Midnight Sessions Court's pronouncment of a substantive due process standard was a reliance on the Court of Appeals for the First Circuit in the case of Creative Environments, Inc. v. Estabrook, 680 F. 2d 822 (1st Cir.) cert. denied, 459 U.S. 989 (1982), Midnight Sessions 945 F. 2d at 683. The Third Circuit stated that "Additionally, the Court of Appeals for the First Circuit has stated that a government's action may violate substantive due process if the plaintiff shows a fundamental procedural

irregularity, racial animus, or the like." Midnight Sessions at 683. (Quoting Creative Enviroments 680 F. 2d at 833). The Midnight Sessions court was very clear in stating that a "fundamental procedural irregularity" alone, without bad faith could constitute a substantive due process violation.

Ms. B did not rely on Midnight Sessions for factual similarity, but only for its concise statement on the circumstances which breed substantive due process violations. Although, Midnight Sessions and Creative Environments concerned deprivation of property rights, the standards constituting a violation of substantive due process can easily be applied to the present case.

The Respondent's act of disclosing Ms. B's priviledged and confidential statements

to her employer and to law enforcement agencies, after a section 7303 hearing, seems to constitute a fundamental procedural irregularity. If unilateral disregard of legislated due process is not a conclusive determinant of the issue of fundamental procedural irregularity, then the question becomes an issue of material fact to be decided by a jury at trial. If the jury finds that the Appellees did engage in what evidently is a fundamental procedural irregularity and that their action was, as it seems, deliberate and arbitrary, then a violation of substantive due process must be found, in violation of Section 1983.

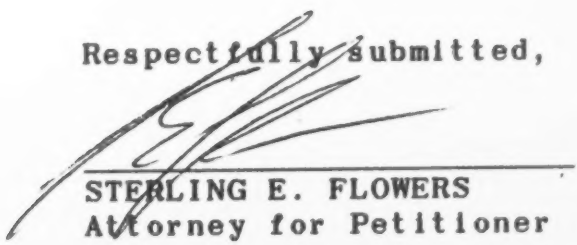
CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to

review the judgement and opinion of the Court of Appeals in this matter.

DATED: May 25, 1993

Respectfully submitted,



STERLING E. FLOWERS
Attorney for Petitioner

APPENDIX A

MS. B.

v.

MONTGOMERY COUNTY
EMERGENCY SERVICE
INC., et al.

Civ. No. 89-0124

United States District Court,
E.D. Pennsylvania.

July 17, 1992.

Patient who received psychiatric care brought civil rights suit under section 1983 alleging that disclosure by state mental health professionals of threats which patient made during the course of treatment violated Pennsylvania Mental Health Procedures Act and patients right to privacy. Defendants' moved for summary judgement. The District Court, Louis H. Pollak, J., held that disclosure of patient's threats to kill co-workers to law

enforcement personnel and one threatened individual did not violate patient's substantive due process right to privacy.

Granted.

Sterling E. Flowers, Law Office of Sterling E. Flowers, Philadelphia, Pa., for plaintiffs, Ms. B and Nancy Pendleton.

Richard Metzinger, Jr., Office of U.S. Atty., Philadelphia, Pa., for defendant U.S. Postal Service.

Jonathan B. Sprague, Post & Schell, P.C., Philadelphia, Pa., for Montgomery County Emergency Service and related individual defendants.

OPINION

LOUIS H. POLLAK, District Judge.

In this action, plaintiff asserts a claim under 42 U.S.C. section 1983 against defendant Montgomery County Emergency Service, an institution at which she received psychiatric treatment, and against individual defendants who participated in

her treatment there. The basis of plaintiff's section 1983 claim is defendants' disclosure to law enforcement personnel and to plaintiff's supervisor of threats made by plaintiff during the course of her treatment. Plaintiff alleges that this disclosure was in violation of section 111 of the Pennsylvania Mental Health Procedures Act, 50 P.S. subsection 7111 et seq., which protects the confidentiality of a mental patient's treatment records. Defendants have now moved for summary judgement.

I. Facts

To succeed on a motion for summary judgement, a moving party must establish that there are no genuine issues of material fact and that the party is entitled to

judgement as a matter of law. Fed. R.Civ.P. 56(c). The moving party is initially responsible for identifying those portions of the factual record which it believes establish that there are no issues of material fact. Once the moving party has done so, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable issue of fact exists. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). In the present case, defendants have submitted a number of affidavits, as well as admissions by both sets of parties, in order to establish that no material issue of fact exists. Plaintiff, in response, has filed no affidavits, depositions, or other evidence. Accordingly, the following are the

undisputed facts for the purposes of this motion for summary judgement.

Plaintiff is a former postal worker who was employed at the United States Post Office at Devon, Pennsylvania. On January 5, 1987, plaintiff's then attorney telephoned an acquaintance who was an employee of defendant, Montgomery County Emergency Services (MCES), and told his acquaintance that, in his opinion, plaintiff needed psychiatric treatment. As a result of this conversation, plaintiff was brought to MCES on January 6. There, she was examined by defendant, K. Ashalatha Reddy, M.D., a psychiatrist then employed by MCES. During the course of Dr. Reddy's evaluation, plaintiff informed Dr. Reddy that she was preoccupied with thoughts of killing her supervisor, Jeffrey Moran, and two co-

employees. She further stated that she owned a 9mm Uzi semi-automatic pistol, that she had previously stalked her supervisor and the two co-employees, that she knew where they lived, and that if she returned to work she would shoot them.

Plaintiff declined to admit herself voluntarily for treatment at MCES. As a result, after her evaluation of plaintiff, Dr. Reddy executed an application for involuntary emergency examination and treatment under section 302 of the Pennsylvania Mental Health Procedures Act (MHPA), 50 P.S. section 7302 (Purdon's Supp.1991). Section 302 authorizes holding plaintiff for involuntary treatment for 120 hours pending an application for extended involuntary emergency treatment.

On January 7, plaintiff repeated her

explicit threats to kill her co-workers during the course of an interview with Louis Pratt, an MCES counselor and social worker. Plaintiff also met with Rocio Nell, M.D., her treating psychiatrist at MCES, and expressed her strong anger at her co-workers, of the manner in which she percieved they had wronged her, and of her desire for revenge. Dr. Nell thereafter completed an application to retain plaintiff for extended involuntary treatment pursuant to section 303 of the MHPA, 50 P.S. section 7303. On January 9, after a hearing, the Mental Health Review Officer denied the application for extended involuntary treatment.

At the conclusion of the hearing, Dr. Nell met with another doctor, MCES's counsel, and defendant Robert Bond, the MCES

criminal justice liaison. The four agreed that the plaintiff's threats were serious and that the intended victims and law enforcement authorities should be warned of plaintiff's threats and imminent discharge. Mr. Bond then telephoned plaintiff's supervisor, Mr. Moran, and representatives of the Federal Bureau of Investigations, the Tredyffrin Township Police Department, and the Norristown Police Department. Mr. Bond informed these individuals of plaintiff's identity, of the nature of her threats, and of the fact that she was about to be released from MCES. Mr. Bond said nothing of the nature of plaintiff's mental illness or of any communications she had made during her course of treatment, other than the explicit threats against three individuals.

Prior to release, plaintiff met once more with Dr. Nell. At the meeting, plaintiff once again voiced her threats. Dr. Nell told plaintiff that the threats would be disclosed to the threatened individuals and to appropriate law enforcement agencies; plaintiff replied that such disclosure would not bother her. Plaintiff was then released.

On January 10, officers of the Tredyffrin Township Police Department arrested plaintiff. She was subsequently convicted of making terroristic threats in violation of 18 Pa.C.S.A. section 2706.

II. Legal Analysis

To prevail on a section 1983 claim, a plaintiff must demonstrate (1) conduct by a person acting under color of state law that

(2) deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. See Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1142 (3d Cir. 1990). Defendants concede, for the purposes of this motion, that they acted under color of state law. The sole issue of this court, therefore, is whether defendants' action deprived plaintiff of any rights, privileges, or immunities secured by the Constitution or laws of the United States.

Plaintiff's complaint originally alleged deprivations of procedural due process and substantive due process. On May 20, 1990, however, on defendants' motion to dismiss, I dismissed plaintiff's procedural

due process claim, allowing only the substantive due process claim to go forward.

Unlike the requirement of procedural due process, which merely requires the state to erect adequate procedural safeguards before effecting a deprivation of liberty or property, the requirement of substantive due process places affirmative limits on what a state may do. See Pittley v. Warrish, 927 F.2d 3, 6 (1st Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 226, 116 L.Ed.2d 183 (1991). Substantive due process is offended when a government actor impinges upon a constitutionally protected fundamental right in a manner that is "so arbitrary and unreasonable as to 'shock the conscience of the court.'" Fanning v. Montgomery County Children and Youth Servs., 702 F.Supp. 1184,

1190 (E.D.Pa. 1988)(quoting In re Scott County Master Docket, 672 F.Supp 1152, 1166 (D.Minn. 1987)); see also Midnight Sessions Ltd. v. City of Philadelphia, 945 F.2d 667, 683, (3d Cir.1991) (stating that "a plaintiff may maintain a claim of substantive due process violations upon allegations that the government deliberately and arbitrarily abused its power"), cert. denied, ___ U.S. ___, 112 S.Ct. 1668, 118 L.Ed.2d 389 (1992).

Plaintiff apparently regards a violation of her substantive right to due process the disclosure of confidential information in violation of section 111 of the MHPA. That section provides in part:

All documents concerning persons in treatment shall be kept confidential and, without the person's written consent, may

not be released or their contents disclosed to anyone except:

> 1) those engaged in providing treatment for the person;
>
> 2) the county adminstrator, pursuant to section 110
>
> 3) a court in the course of legal proceedings authorized by this act; and
>
> 4) pursuant to Federal rules, statutes and regulations governing disclosure of patient information where treatment is undertaken in a Federal agency.
>
> In no event, however, shall priviledged communication, whether written or oral, be disclosed to anyone without such written consent....

50 P.S. section 7111 (Purdon's Supp.1991). It is not immediately apparent that defendant's conduct did violate the statute. As defendants note, the MHPA's implimenting regulations provide for nonconsensual release of confidential information "[i]n response to an emergency medical situation

when release of information is necessary to prevent serious risk of bodily harm or death." 55 Pa.Code section 5100.32(9). While the statute does not define the phrase "emergency medical situtation," it does not purport to restrict disclosure to situations where the patient herself is at serious risk of bodily harm or death; it may plausibly be read to encompass situations in which the threat is to a third party.

Even if the defendants' conduct violated the MHPA, however, such a violation of a state statute is not sufficient, standing alone, to establish a violation of a constitutional right. See Scheetz v. The Morning Call, Inc., 946 F.2d 202, 207 (3d Cir.1991), cert. denied, ___ U.S. ___, 112 S.CT. 1171, 117 L.Ed.2d 417 (1992); Pesce v. J. Sterling Morton High

School Dist. 201, 830 F.2d 789, 797 (7th Cir.1987). It is thus necessary to explore the extent to which defendants' actions implicate plaintiff's constitutional right to liberty or property, the rights that are protected by the due process clause of the Fourteenth Amendment.

The Fourteenth Amendment's concept of personal liberty includes protection of limited zones of privacy.(1) See Whalen v. Roe, 429 U.S. 589, 598-99 n. 23, 97 S.Ct. 869, 875-76, n. 23, 51 L.Ed.2d 64 (1977); Roe v. Wade, 410 U.S. 113, 153, 93 S.Ct. 705, 726-727, 35 L.Ed.2d 147 (1973); Borucki v. Ryan, 827 F.2d 836, 839 (1st

(1) Defendants concede, for the puposes of this motion, that plaintiff's interest in the dondidentiality of her medical records falls within her constitutional right to liberty.

Cir.1987). The protection of privacy extends to two types of interests: "the idividual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions." Whalen, 429 U.S. at 599-600, 97 S.Ct. at 876. The Third Circuit has long held that medical records are protected from disclosure by the first of these interests, the confidentiality branch of the right to privacy. See Scheetz, 946 F.2d at 206; United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-78 (3d Cir.1980); cf. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 112-13 (3d Cir.1987) (police application seeking medical information implicates right to privacy). It is therefore clear that plaintiff's constitutional rights are implicated in

defendants' disclosure of threats that plaintiff made during the course of her treatment.

The fact that plaintiff's constitutional rights are implicated does not conclude the inquiry, however, because constitutional protection of the confidentiality of medical records is far from absolute. Rather, the court must engage in a balancing of interests, weighing the individual's interest in nondisclosure against the state's interests that are furthered by the disclosure. See Fraternal Order of Police, 812 F.2d at 110-11; Westinghouse, 638 F.2d at 578. In describing the balancing test, the Westinghouse court stated;

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain,

> the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandatory, articulated public policy, or other recognizable public interest militating toward access.

Westinghouse, 638 F.2d at 578.

In the present case, the type of record involved and the information contained therein are deserving of a high degree of protection. In the process of undergoing psychiatric treatment, a patient is expected to lay bare his inner self, to reveal thoughts and feelings that are highly personal and that are often painful and embarassing to confront. See O'Donnell v. United States, 891 F.2d 1079, 1086 (3d Cir.1989); In re B, 482 Pa. 471, 394 A.2d 419, 426 (1978). Indeed, the success of psychiatric treatment depends on

the patient's ability and willingness to reveal his innermost thoughts, desires, and fears. A patient cannot and should not be strong assurances that what he says in the course of treatment will be kept confidential. See In re B, 394 A.2d at 426.

Breaches of confidentiality create several types of harm. First, the breach may produce direct negative consequences for the patient. Such was the case here, as plaintiff, as result of defendants' communication, was arrested and ultimately convicted of making terroristic threats. Second, the patient may suffer harm simply from knowing that elements of the intimate details of his life have been laid bare for the uninvited viewer. Third, the patient may suffer harm to his public image that, if the public disclosures are true, cannot be

rehabilitated through legal action. See O'Donnell, 891 F.2d at 1086. Finally, the patient-doctor relationship, founded as it is on trust, may be irredeemably shattered.

It is evident that only a strong state interest could outweigh plaintiff's interest in maintaining the confidentiality of her psychiatric records. It is likewise evident, however, that the state interest in protecting citizens from violent assault is a sufficiently strong state interest. The state's obligation to protect the safety of members of the public from the mentally ill has been recognized both judicially and statutorily. See In re J.S., 526 Pa. 418, 586 A.2d 909, 913 (1991); 50 P.S. section 7102. Indeed, several states have explicitly stated that a treating psychiatrist has a duty to take reasonable

steps to avert harm to third persons that she believes is reasonably foreseeable in light of threats made to by her patient. In the seminal case of Tarasoff v. Regents of the University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976), a psychiatric patient had made explicit threats against a specific individual in the course of psychiatric treatment, and thereafter killed her. The victim's parents filed suit against the patient's psychologist, alleging that a psychologist has a duty to warn them of the threats that had been made against their daughter. In allowing plaintiffs to amend their complaints to allege failure to warn the victim herself, the California Supreme Court located a duty to protect third persons from harm:

> When a therapist determines, or

> pursuant to the standards of the profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

Id., 17 Cal.3d at 431, 131 Cal.Rptr. at 20, 551 P.2d at 340. The court reached this conclusion despite its recognition of a strong public interest in the confidentiality of communications between a patient and a mental health professional:

> Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed

knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party of those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such risks lies in the public interest. Id., 17 Cal.3d at 442, 131 CalRptr. at 27-28, 552 P.2d at 347-48.

Most juridictions that have considered the issue have concurred with the Tarasoff court in finding that a mental health professional has a duty to take reasonable steps to avert harm to others threatened by her patient. See, e.g., Hamman v. County of Maricopa, 161 Ariz. 58, 64, 775 P.2d 1122, 1128 (1989); David v. Llim, 124 Mich.App.

291, 335 N.W.2d 481, 486-89 (1983); McIntosh v. Milano, 168 N.J.Super. 466, 403 A.2d 500, 512 (1979); Peck v. Counseling Serv., 146 Vt. 61, 499 A.2d 422, 426 (1985) (plurality); Schuster v. Altenberg, 144 Wis.2d 223, 424 N.W.2d 159, 171 (1988). The duty imposed by these courts is in general accord with the limits on patient-therapist confidentiality recognized by the American Medical Association:

> The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to anther person and there is a reasonable probabilty that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities.

American Medical Association Principles of Medical Ethics, paragraph 5.95, reprinted

in Council on Ethical and Judicial Affairs of the American Medical Association, Current Opinions, at 21 (1989).

The Pennsylvania courts have neither adopted nor rejected the reasoning of Tarasoff and its progeny. See Dunkle v. Food Serv. East, Inc., 400 Pa.Super. 58, 582 A.2d 1342, 1346 (1990). In Dunkle, the Pennsylvania Superior Court suggested that, if it were to recognize Tarasoff, it would interpret that decision narrowly because of the strong concern in Pennsylvania for confidentiality of patient-therapist communications, as expressed, inter alia, in the MHPA. See id. 582 A.2d at 1347. The court did not suggest, however, that the Mental Health Procedures Act stood as an absolute bar to disclosure by a therapist of

her patient's threats of violence.{2} Further, even if the Pennsylvania courts were to determine that the Mental Health Procedures Act did establish a privacy interest under Pennsylvania law that was sufficiently strong to bar defendants from disclosure in the present circumstances, such a conclusion would not necessarily establish a violation of plaintiff's constitutional rights. Plaintiff's constitutionally-protected right to privacy is not necessarily coextensive with her privacy rights under state law.

Defendants in the present case found

{2} The patient in Dunkle had exhibited violent tendencies during the course of his psychological treatment; he had done nothing, however, to suggest that he presented a particular danger to his eventual victim. Under these circumstances, the court concluded, the psychologist did not have a duty to warn the eventual victim. See Dunkle, 582 A.2d at 1344-45.

themselves in an extraordinarily delicate position. On the one hand, they were bound by their ethical duty and statutory duty to maintain the confident-iality of plaintiff's communications to them. On the other hand, they were aware, based on plaintiff's repeated threats, of a grave danger to individuals who were the targets of plaintiff's threats. Once they decided to act, defendants limited their disclosure only to the fact that plaintiff had made the threats and apparently had the means to carry them out, and communicated the threats only to law enforcement personnel and one of the individuals threatened. Given the extensive judicial recognition of a common-law duty to warn and the limits placed on the ethical duty of confidentiality by the American Medical Association, I cannot conclude that the defendants' acts

improperly infringed on plaintiff's Fourteenth Amendment right to privacy.

It may be that defendants' conduct violated the Pennsylvania Mental Health Procedures Act, and plaintiff might have a remedy under that law. Plaintiff does not seek such a remedy here, however; rather, she seeks to recover for alleged injury to her constitutional rights. On the undisputed facts before the court on defendants' motion for summary judgement, I have concluded that no such injury exists. Accordingly, defendants' motion for summary judgement will be granted.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-1682

MS. B.,
Appellant

V.

THE UNITED STATES POSTAL SERVICE; LEN CRANDLE, POSTAL INSPECTOR; TREDYFFRIN TOWNSHIP; DAVID C. RAUM, DETECTIVE, Individually and in his official capacity; MONTGOMERY COUNTY EMERGENCY SERVICES, INC.; DR. K. ASHALATHA REDDY, Individually and in her official capacity; ROBERT BOND, Individually and in his official capacity

---

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 89-00124)
District Judge: Hon. Louis H. Pollak

Submitted Under Third Circuit Rule 12(6)
February 22, 1993

Before SLOVITER, Chief Judge, MANSMANN and SCIRICA, Circuit Judges

(Opinion filed FEB 24 1993)

MEMORANDUM OPINION OF THE COURT

SLOVITER, Chief Judge.

This is an appeal from the district court's grant of summary judgement for the defendants Montgomery County Emergency Service, Inc. (MCES) and two of its employees in an action brought against them under 42 U.S.C. section 1983. We summarize the undisputed facts only briefly because they are set forth fully in the district court's opinion on the bases of which we will affirm.

I.

In 1986, appellant Ms. B. was a postal worker in a United States post office in suburban Philadelphia. On January 5, 1987, Ms. B.'s attorney notified the nursing coordinator at Montgomery County Emergency

Services, a hospital that provides mental health emergency services, that Ms. B. was in his office threatening to shoot her postal supervisor and several of her co-workers, and then kill herself. The attorney also told the coordinator that Ms. B. had bought a semi-automatic weapon to do so.

The next day, at the suggestion of defendant Robert Bond, who was then MCES's crimnial justice liaison,(1) Ms. B.'s attorney brought Ms. B. to MCES, but she refused to commit herself voluntarily. Ms. B. was evaluated by defendant Dr. K.A. Reddy, a psychiatrist at MCES. Ms. B. told Reddy that she was preoccupied with thoughts

---

(1) As a criminal justice liaison, Bond was responcible for instructing and assisting law enforcement personnel in the handling of mentally disturbed individuals. S.A. at 174.

of killing her supervisor and two co-workers, and that she had driven around and found out where they lived. Reddy diagnosed Ms. B. as suffering from acute exacerbation and executed an application for involuntary emergency treatment under section 7302 of the Mental Health Procedures Act (MHPA), 50 P.S. section 7101 (Supp. 1992).{2} Ms. B. was then examined by Dr. Rocio Nell, another psychiatrist at MCES, who diagnosed her as suffering from atypical paranoid psychosis. Dr. Nell applied to extend Ms. B.'s treatment under section 7303 of the MHPA because he believed that she posed a clear and present danger to identified victims.{3}

{2} Section 7302 of the MHPA authorizes holding persons who require emergency examination and treatment for up to 120 hours.

{3} Upon the filing of an application under section 7303, counsel shall be appointed and an informal conference shall be held before

The application for involuntary treatment was denied, and the record does not reveal why. Immediately after the conference, Bond and Nell met with MCES's Executive Director and its legal counsel. The group authorized Bond to telephone the FBI, the Norristown and Tredyffrin Township police departments, and Ms. B.'s supervisor at the post office to tell them that she was being discharged from the hospital, that she had threatened to shoot her supervisor and two co-workers, and that she owned a gun. Bond did not disclose either Ms. B.'s

---

{4} cont' a judge or mental health review officer. 50 P.S. section 7303(c). If the judge or mental health review officer finds that an individual is severely mentally disabled, s/he shall so certify. If there is no such certification, the individual must be released. 50 P.S. section 7303(c). An individual is defined as severely mentally disabled "when, as a result of mental illness...he poses a clear and present danger of harm to others or to himself." 50 P.S. section 7303(a).

diagnosis or her psychiatric records, and acted in the good faith belief that his limited disclosure was authorized by Pennsylvania law.{4} On January 10, 1987, Ms. B. was arrested by Tredyffrin police, charged and thereafter convicted by a jury of making terroristic threats. Her conviction was affirmed by the Superior Court of Pennsylvania.

Ms. B. then filed this civil rights complaint against a number of

---

{4} Although section 7111 of the MHPA provides that a patient's records and communications are confidential and may not be disclosed without written consent, regulations promulgated pursuant to the MHPA provide for the nonconsensual release of confidential information "[i]n responce to an emergency medical situation when release of information is necessary to prevent serious risk of bodily harm or death. Only specific information pertinent to the relief of the emergency may be released on a nonconsensual basis." 55 Pa. Code section 5100.32(9).

entities and persons. After a partial motion to dismiss was granted, only the section 1983 claim against MCES, Bond, and Dr. Reddy remained, which alleged that their disclosure of statements made by Ms. B. violated her right to substantive due process. Defendants filed a motion for summary judgement, supporting the motion with admissions by Ms. B., her answers to interrogatories, and affidavits from the nursing coordinator, Bond, and Nell. Ms. B. filed no affidavits or other evidence in responce to the motion, but merely filed a brief in opposition. The district court granted summary judgement for defendants. This appeal followed.

II.

The scope of review of a district court's grant of summary judgement is

plenary. American Medical Imaging Corp. v. St. Paul Fire and Marine Ins. Co., 949 F.2d 690 (3d Cir. 1991). In reviewing the record, the non-movant's allegations must be taken as true, and when they conflict with those of the movant, the former must recieve the benefit of the doubt. Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgement is properly granted where there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

It is well settled that medical records and other types of confidential information are protected from disclosure by the right to privacy. Whalen v. Roe, 429 U.S. 589 (1977). In United States v. Westinghouse Electric Corp., 638 F.2d 570

(3d Cir. 1980), we set forth a rigorous test for district courts to follow to determine whether disclosure of confidential information violates this right. After careful review of the record, we find that the district court in the instant case engaged in the analysis enunciated by Westinghouse when it found that Ms. B.'s constitutional right to privacy had not been violated.{5}

Ms. B. argues on appeal that her "interest in her constitutionally protected right to nondisclosure of her psychiatric

---

{5} It is questionable whether the disclosure in question is tantamount to medical or psychiatric information of the sort protected by the constitution. The record is undisputed that the disclosure did not concern Ms. B.'s diagnosis or her psychiatric records, but was that she had a gun and had threatened to shoot identified victims.

records far outweighs the Appellees' questionable interest in protecting Ms. B.'s co-workers." Appellant's Brief at 17. Westinghouse demands more than a simple weighing of the two factors to which appellant refers. The district court expressly took into account the high degree of protection properly accorded psychiatric information, but nevertheless found the disclosure did not rise to the level of a constitutional violation. Assuming arguendo that the material disclosed is constitutionally protected, but see note 5 infra, we agree with the district court's analysis and its conclusion that Ms. B.'s privacy right was not infringed.{6}

{6} Under a similar analysis, we also find Ms. B.'s argument that the disclosure violated the Pennsylvania Constitution without merit. Fraternal Order of Police, Lodge No. 5 v. Philadelphia, 812 F.2d 105 (3d Cir. 1987) (applying Westinghouse balancing test to privacy claim based on Pennsylvania Constitution).

Ms. B. also argues that there is an issue of fact created by the apparent conflict between the mental health review officer and defendants regarding her mental condition. That conflict is insufficient to preclude summary judgement. The question presented by the summary judgement motion was a purely legal one - whether the disclosure, made in good faith, violated Ms. B.'s constitutional right to substantive due process. A disagreement between the parties regarding Ms. B.'s mental condition is not material to this legal analysis. As the Supreme Court has said, "[T]he mere existence of some factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgement; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986) (emphasis in original).{7}

Ms. B. also argues that the disclosure violated the MHPA and therefore her constitutional rights. However, it is far from clear that the disclosure violated the MHPA, because of the exceptions for emergency situations in the regulations promulgated pursuant to the statute. No Pennsylvania court has interpreted the regulatory exception to date, and we need not do so here, for even if the disclosures had violated the MHPA, the violation of a state statute alone is insufficient to

{7} Ms. B.'s reliance in her reply brief on Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 (3d Cir. 1991), cert. denied, 112 S. Ct. 1668 (1992), is misplaced. The plaintiff in that case alleged that the city's actions were motivated by bad faith, which is not a claim Ms. B. makes in the instant case.

establish a violation of a constitutional right. Scheetz v. Morning Call, Inc., 946 F.2d 202, 207 (3d Cir. 1991), cert. denied, 112 S.Ct. 1171 (1992).

III.

For the foregoing reasons, we will affirm the district court's order granting summary judgement.

TO THE CLERK:

Please file the foregoing opinion.

Chief Judge

No. 93-21

(2)

FILED
AUG 11 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MS. B.,

Petitioner,

v.

MONTGOMERY COUNTY EMERGENCY SERVICE, INC., DR. K. ASHALATHA REDDY AND ROBERT BOND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Jonathan B. Sprague

Attorney for Respondents
Montgomery County Emergency Service, Inc., Dr. K. Ashalatha Reddy and Robert Bond

POST & SCHELL, P.C.
19th Floor
1800 JFK Boulevard
Philadelphia, PA 19103
(215) 587-1155

Of Counsel

BEST AVAILABLE COPY

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9900

16 pp

QUESTIONS PRESENTED FOR REVIEW

I. Is the record-bound question whether a genuine issue of material fact exists a special and important reason for this Court to exercise its discretion, under Supreme Court Rule 10, and grant the Petition for Writ of Certiorari?

II. Does the court of appeals' disposition of Ms. B's substantive due process claim follow this Court's precedent?

III. Is the court of appeals' disposition of Ms. B's substantive due process claim consistent with sister courts of appeals decisions?

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	ii
Table of Authorities	iii
Statutes and Rules	v
Citations of the Opinions and Judgments Delivered in the Courts Below	vi
Constitutional and Statutory Provisions Involved	1
Counterstatement of the Case	3
Reasons for Denying the Writ	3
I. ASSUMING A GENERAL ISSUE OF MATERIAL FACT EXISTS BARRING SUMMARY JUDGMENT, CERTIORARI SHOULD NOT BE GRANTED ON THE BASIS OF THIS RECORD- BOUND FACTUAL ISSUE	4
II. ASSUMING RESPONDENTS VIOLATED PENNSYLVANIA'S MENTAL HEALTH PROCEDURES ACT, 50 P.S. §§7101 *ET SEQ.*, MERE STATE STATUTORY VIOLATIONS DO NOT, STANDING ALONE, OFFEND THE SUBSTANTIVE DUE PROCESS COMPONENT OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	5
Conclusion	9

TABLE OF AUTHORITIES

Cases: Page

Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989) 8

Baker v. McCollan, 443 U.S. 137 (1979) 6

Bishop v. Wood, 426 U.S. 341 (1976) 6

Chesterfield Development Corp. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992)..... 8

Collins v. City of Harker Heights, ____ U.S. ____, 112 S.Ct. 1061, 117 L.Ed.2d 251 (1992)..... 5, 6

Coyne v. City of Somerville, 972 F.2d 440 (1st Cir. 1992) 7

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 6

Evans v. City of Marlin, 986 F.2d 104 (5th Cir. 1993) 7

Holthous v. Board of Education, Cincinnati Public Schools, 986 F.2d 1044 (6th Cir. 1993)..... 8

McKinney v. Pate, 985 F.2d at 1502 (11th Cir. 1993), *reh'g granted*, 994 F.2d 772 (11th Cir. 1993) 7

Ms. B v. Montgomery County Emergency Service, Inc., 799 F.Supp. 534 (E.D.Pa. 1992), *aff'd mem. sub nom. Ms. B v. The United States Postal Service*, 989 F.2d 488 (1993).....vi, 3

Scheetz v. The Morning Call, 946 F.2d 202 (3d Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1171, 117 L.Ed.2d 417 (1992)..... 5, 7

Smith v. City of Picayune, 795 F.2d 482 (5th Cir. 1986) 7

United States v. Johnston, 268 U.S. 220 (1925)... 5

TABLE OF AUTHORITIES – *(Continued)*

Cases: Page

United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) 5

Whalen v. Roe, 429 U.S. 589 (1977) 5

STATUTES AND RULES

Page

42 U.S.C. §1983 ..... 1, 2, 3, 4, 5, 6

28 U.S.C. §1331 3

Supreme Court Rule 10 ..... i, 4

Mental Health Procedures Act ("MHPA"), Act of July 9, 1976, P.L. 817, *as amended*, 50 P.S. §§7101 *et seq.* 3

Mental Health Manual, 55 Pa.Code §5100.32(a)(9) 2

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Respondents correct here misstatements made in corresponding section of Ms. B's Petition for Writ of Certiorari. First, the Opinion of the United States District Court for the Eastern District of Pennsylvania, captioned *Ms. B v. Montgomery County Emergency Service, Inc.*, 799 F.Supp. 534 (E.D.Pa. 1992), *aff'd mem. sub nom. Ms. B. v. The United States Postal Service*, 989 F.2d 488 (3d Cir. 1993), is attached to Ms. B's Petition as Appendix "A" and not, as Ms. B. represents, Appendix "B". Second, the district court Opinion, captioned *Ms. B v. Montgomery County Emergency Service, Inc., et al.*, was published in the *Federal Supplement* at 799 F.Supp. 534 (E.D.Pa. 1992), and is not, as Ms. B. represents, "an unpublished written opinion." (Ms. B's Petition at 1).

No. 93-21

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MS. B.,

Petitioner,

v.

MONTGOMERY COUNTY EMERGENCY SERVICE, INC., DR. K. ASHALATHA REDDY AND ROBERT BOND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions involved include the Due Process Clause of the Fourteenth Amendment, 42 U.S.C. §1983, and 55 Pa.Code §5100.32(9).

The Due Process Clause of the Fourteenth Amendment states the following:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

U.S. Const. Amdt. 14.

Section 1983, 42 U.S.C. §1983, states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable for the party injured in an action at law, suit in equity, or other proper proceeding or redress. . . .

42 U.S.C. §1983.

The nonconsensual release of information provision, at 55 Pa.Code §5100.32(a)(9), states the following:

> **§5100.32. Nonconsensual release of information.**
>
> (a) Records concerning persons receiving or having received treatment shall be kept confidential and shall not be released, nor their content disclosed without the consent of a person given under §5100.34 (relating to consensual release to third persons), except that relevant portions or summaries may be released or copied as follows:
>
> (9) In response to an emergency medical situation when release of information is necessary to prevent serious risk of bodily harm or death. Only specific information pertinent to the relief of the emergency may be released on a nonconsensual basis. . . .

55 Pa.Code §5100.32(a)(9).

COUNTERSTATEMENT OF THE CASE

The district court Opinion, authored by the Honorable Louis H. Pollak, adequately sets forth this case's factual background. Respondents incorporate by reference Judge Pollak's factual recitation. *Ms. B v. Montgomery County Emergency Service, Inc.*, 799 F.Supp. 534, 535 (E.D.Pa. 1992), *aff'd mem. sub nom. Ms. B. v. The United States Postal Service*, 989 F.2d 488 (3d Cir. 1993).

Ms. B's Petition errs in claiming that the United States District Court for the Eastern District of Pennsylvania had jurisdiction over this case under 42 U.S.C. §1983. Section 1983 is a civil rights, not a jurisdictional, statute. The district court possessed jurisdiction over this matter by virtue of 28 U.S.C. §1331 ("The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

REASONS FOR DENYING THE WRIT

This case is unworthy of certiorari for the following reasons. First, whether a genuine issue of material fact precludes summary judgment is wholly unimportant under Rule 10. This Court will not grant certiorari to review a decision that solely turns upon an analysis of facts or to determine whether the evidence supports a judgment. With respect to these issues, courts of appeals are generally the courts of last resort.

Second, assuming that Respondents violated the Commonwealth of Pennsylvania's Mental Health Procedures Act, Act of July 9, 1976, P.L. 817, *as amended*, 50 P.S. §§7101 *et seq.* ("MHPA"), this Court's precedent establishes conclusively that a mere state statutory violation is not actionable under §1983 as a substantive due process offense. Section 1983 provides a citizen with an effective remedy against abuses of *state* power that violate *federal* law. Neither §1983 nor the United States Constitution provides a remedy for alleged abuses that,

as here, do *not* violate federal law. A violation of state law, standing alone, does not constitute a denial of substantive due process. The court of appeals decision here therefore comports rather than conflicts with Supreme Court precedent.

Third, the court of appeals' holding – that, assuming Respondents violated the MHPA, a state statutory violation is not actionable under §1983 as a substantive due process offense – is consistent with the overwhelming majority of courts of appeals decisions. The First, Third, Fifth, Sixth, Seventh and Eighth Circuit Courts of Appeals have ruled that violations of state law – even when arbitrary, capricious or undertaken in bad faith – do not, without more, give rise to a denial of substantive due process under the United States Constitution.

I. Assuming A Genuine Issue Of Material Fact Exists Barring Summary Judgment, Certiorari Should Not Be Granted On The Basis Of This Record-Bound Factual Issue

Ms. B's first question presented for review – whether the district court erred in granting summary judgment given the existence of a genuine issue of material fact – ignores the weighty considerations governing the exercise of this Court's discretion under Supreme Court Rule 10. "A Petition for a writ of certiorari will be granted only when there are *special* and *important* reasons therefore. Supreme Court Rule 10.1 (emphasis added). Such "important" reasons include conflicts between a court of appeals and 1) another court of appeals; 2) a state court of last resort (involving federal question); and 3) this Court's applicable decisions. Supreme Court Rule 10.1(a) and (c).

Ms. B's Petition does not assert any "important" or weighty reasons for this Court to grant certiorari. (That is because no such reasons exist). Instead, raising

record-sensitive factual issue under the summary judgment standard, the Petition improperly treats this Court like a super-court of appeals.

This Court has consistently held that it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). With respect to these record-sensitive issues, the courts of appeals, and not this Court, are generally courts of last resort.

Even assuming the existence of a genuine issue of material fact – and no such dispute exists here – this fact-based or record-sensitive issue is neither "special" nor "important" and, therefore, is irrelevant.

II. Assuming Respondents Violated The MHPA, A Mere State Statutory Violation Does Not, Standing Alone, Offend The Substantive Due Process Component Of The Due Process Clause Of The United States Constitution

To prevail in a §1983 action, one must establish that the conduct complained of was 1) committed by a person acting under color of state law and 2) deprived a person of rights, privileges or immunities secured by the Constitution and the laws of the United States. *Collins v. City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 1065, 117 L.Ed.2d 261 (1992). Rights Respondents' allegedly infringed – a privacy right to confidential medical records and information – is encompassed within "liberty" substantively protected by the Fourteenth Amendment's Due Process Clause. *Whalen v. Roe*, 429 U.S. 589 (1977) (constitutionally protected right to confidentiality); *Scheetz v. The Morning Call*, 946 F.2d 202, 206 (3d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1171, 117 L.Ed.2d 417 (1992) ("We have recognized that some confidential information, such as medical records, is constitutionally protected under the confidentiality branch of the federal privacy right."); and *United States v. Westinghouse Elec. Corp.*,

638 F.2d 570, 577 (3d Cir. 1980) ("There should be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.") (footnote omitted).

Ms. B asserts that Respondents violated her right to substantive due process under the Fourteenth Amendment "by virtue of Respondent's [sic] unconsented disclosure of confidential and privileged information in violation of Section 7111 of the Mental Health Procedure [sic] Act and the Pennsylvania Constitution." (Petition at i). The question then, as framed by Ms. B, is whether §1983 provides a remedy against alleged abuses of state power that violate state, as opposed to federal, law. The answer, in short, is "No."

It is well-settled that §1983 does *not* provide a remedy for state power abuses that merely violate state law. *Collins*, ___ U.S. at ___, 112 S.Ct. at 1065 (1992) ("Although the statute provides the citizen with an effective remedy against those abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law. . . ."); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989) ("[T]he claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation."); *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles."); *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.").

Section 1983 does *not* provide a remedy for state power abuses that offend state law. Ms. B, however, improperly seeks relief under §1983 for alleged abuses

of state power in violation, not of federal law, but of state statute. The court of appeals, in affirming the district court's well-reasoned Opinion, therefore followed, rather than substantially departed from, Supreme Court precedent. *Cf. McKinney v. Pate*, 985 F.2d 1502, 1507-15 (11th Cir. 1993) (Tjoflat C.J., specially concurring opinion criticizing Eleventh Circuit's divergence from Supreme Court substantive due process jurisprudence), *reh'g granted*, 994 F.2d 772 (11th Cir. 1993).

The Petition does not allege any divergence between this Court's and the court of appeals' substantive due process jurisprudence because none exists. The court of appeals, following this Court's pronouncements, properly resisted Ms. B's transparent attempt to federalize an alleged state statutory violation.

The Petition also does not assert that the Third Circuit's decision conflicts with sister courts of appeals decisions. The overwhelming weight of authority among the courts of appeals is that a mere state statutory violation does not offend substantive due process. The question whether Respondents violated Ms. B's *federal* constitutional right to privacy is therefore distinct from whether Respondents violated a state statute; namely, the MHPA. *Scheetz*, 946 F.2d at 206-07 (3d Cir. 1991) ("We note that the question of whether a federal constitutional right of privacy has been violated is a distinct question from whether a federal statutory right to privacy . . . or a state common law right to privacy has been violated."); *Coyne v. City of Somerville*, 972 F.2d 440, 443-44 (1st Cir. 1992) ("It is bedrock law in this circuit, however, that violations of state law – even where arbitrary, capricious, or undertaken in bad faith – do not, without more, give rise to a denial of substantive due process under the U.S. Constitution.") (footnote omitted). *Evans v. City of Marlin*, 986 F.2d 104, 108 n.6 (5th Cir. 1993) ("The failure to follow procedural guidelines, standing alone, does not implicate constitutional liability."); *Smith v. City of Picayune*, 795 F.2d 482, 487 (5th Cir. 1986) ("Although the City did not conform to

state law in zoning the property, that violation of state law does not *per se* constitute denial of the federal constitutional right to equal protection of law."); *Holthaus v. Board of Education, Cincinnati Public Schools*, 986 F.2d 1044, 1046 (6th Cir. 1993) (discharge of high school football coach for allegedly improper racial remark did not violate coach's substantive due process rights); *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989) ("A state ought to follow its law, but to treat a violation of state law as a violation of the Constitution is to make the federal government the enforcer of state law. State rather than federal courts are the appropriate institutions to enforce state rules."); and *Chesterfield Development Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) ("[W]e have unequivocally held that a state-law error, no matter how fundamental, cannot in and of itself create a federal due process violation.").

In light of the above overwhelming authority, the court of appeals decision does not, by any stretch of the imagination, conflict with other courts of appeals decisions.

Accordingly, no special and important reasons exist for the granting of certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JONATHAN B. SPRAGUE, ESQ.

Attorney for Respondents,
Montgomery County Emergency Service, Inc., Robert Bond and Dr. K. Ashalatha Peddy

POST & SCHELL, P.C.
19th Floor
1800 JFK Boulevard
Philadelphia, PA 19103
(215) 587-1155

DATED: August 12, 1993